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(Printed Confidentially)

ARBITRATION

UNDER

THE BRITISH NORTH AMERICA ACT 1867.

LAW OPINION

On Proceedings and Award by Two Arbitrators.

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On the ninth day of July last, the Arbitrator appointed by the Government of Quebec withdrew from the sittings of the Arbitrators and gave in the resignation of his appointment, which was accepted, and a supersedeas was thereupon issued by that Government. The reasons for his resignation are assigned in the printed pamphlet intended to make part of the record of proceedings before the Arbitrators.

At the time of the resignation a decision had been agreed upon by two of the Arbitrators, the Honorable Messrs. MacPherson and Gray, upon certain preliminary questions, from which the Arbitrator chosen by Quebec dissented. That decision had not then been pronounced or officially promulgated, although an order to that effect had been made at the time of adopting it.

A hearing had also been had upon the question whether a decision by two of the Arbitrators (a majority) against the opinion of the third would be valid. Upon this latter question no decision had been arrived at and no final deliberation upon it had taken place.

After the withdrawal and resignation of the Arbitrator appointed by Quebec, the judgment previously agreed upon by the two other Arbitrators on the preliminary questions was formerly pronounced by them. A decision was also agreed upon by the two Arbitrators in the absence of the third on the question of the power of the majority to decide, and was formally pronounced on the twenty-first day of July.

The two Arbitrators afterwards held sittings on several different days, at which the counsel for Ontario were heard upon incidental points, and finally upon the merits of the case ; and by an award (so called) rendered on the third day of September last, the two Arbitrators assumed to make a division and adjustment of the debts and assets of U. & L. Canada under the authority of the B. N. A. Act. At these sittings the Government of Quebec was not in any manner represented, but on the contrary protested against the proceedings and the award as an illegal usurpation of authority and void in law.

It is perhaps unnecessary to premise that in a matter involving such great interests between parties of high dignity, it is above all things important that there should be no infringement of legal rights, and that nothing should be hazarded which can lead to a just complaint by one Province that its rights have been sacrificed to the advantage of the other. An indiscretion in this respect, from whatever cause arising, is likely to have as its consequence a conflict within the Dominion which may lead to great public injury.

A strict legality in the proceedings is the more essential as the three persons appointed under the Act were not only Arbitrators, but necessarily Assignors to each of the Provinces of Ontario and Quebec, of the assets and property belonging to the late Province of Canada. Up to the time of the award and assignment these assets and property are held jointly in undivided right by the two Provinces, and in order that each should be divested of its legal estate in the portion awarded to the other, and obtain a valid title to his own portion, the Arbitrators assuming to make the award must have a clear authority to pass the title as Assignors.

If any doubt should arise of their authority in that respect, the question of title would inevitably come up in one shape or another before the Provincial Courts of Law, a contingency which, for obvious reasons, ought to be sedulously guarded against. Yet it seems to be too plain, that notwithstanding these considerations, ground has been ventured upon, which is both unsafe to the public interests and indefensible in law, and it therefore becomes necessary in view of the serious consequences involved, that the legality of the proceedings and award should be carefully examined.

The questions upon which the validity of the proceedings and award depend are to be tried by the terms of the 142nd section of the B. N. A. Act, which are that the division and adjustment contemplated by the Act "shall be referred to the arbitrament of three Arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada," and these questions may be stated under three specific heads:

1. Whether upon a hearing before the three Arbitrators, two of them could legally render a decision, and if yea, could they do so in the absence of the third.

2. Whether upon a hearing before two of the Arbitrators only, these two could legally render a decision in the absence of the third.

3. Whether, after one of the Arbitrators had resigned his office, and his authority had been revoked, the remaining two could legally proceed to hear the case, and to make a final award.

Before entering upon these questions separately, I propose to discuss the subject of the Arbitration upon principles and considerations of a character entirely different from any which seem to have engaged the attention of the two Arbitrators in arriving at their conclusions. It is entitled to be regarded from a higher level and in a broader aspect than they have viewed it. The reference to Arbitrament contained in the 142nd Sec. of the Act is in fact in the nature of a treaty between Independent States, and is not a matter to be dealt with upon the narrow technicalities of

Municipal Law intended for a class of cases with which it has no analogy. Such is not only the view which sound reason suggests, but it is the necessary result of the provisions of the Act, coupled with the circumstances which attended its passation, and surround its execution.

The terms of the Act of Confederation were a matter of negotiation and compact between the delegates of the several Provinces of British North America. Whatever was finally agreed upon by them was made part of the law. Their conference did not differ essentially in so far as their relations to each other were concerned, from a conference of independent nations. The two sections of the then Province of Canada, Upper Canada and Lower Canada, there discussed the subject of their financial condition, their income, resources and liabilities, and the division and adjustment of their common debts and assets. They could have given consent to any compromise or arrangement of the matter, which they thought fit, or either could have withheld such consent or withdrawn it at any period of the negotiation. Under the difficulty of an immediate settlement of their several rights, the discussion resulted in a convention that they should be left to the arbitrament of three persons. This convention was expressed in the Statute in definite and unambiguous terms, and was as absolute and final as any other positive provision contained in it. It had all the characteristics of a Public Treaty, containing and expressing its own law, which is the higher law, and not subject to be forced from its plain meaning by the application of any rules of the Municipal Law of one country or another. If, under such a treaty, three or more commissioners were appointed to exercise a specific power, without any provision for choosing an umpire or for giving authority to the majority, it is certain that upon the dissent and withdrawal of the commissioner appointed by one of the Governments, such Government would not be bound by any decision given by the others. What the Provinces agreed to do, instead of finally settling their respective claims then and there, was to take the judgment of three persons not of two. If either of the three Governments by whom they were to be chosen had not thought fit to appoint, it could not have been compelled to do so, and in such case no arbitration could have taken place; for it was not by two under any circumstances, but by three that the Provinces had consented to be judged. If, after the appointments had been made, the death of an Arbitrator occurred, or other causes reduced the number from three to two, the compact was at an end. No power could enforce an appointment in the first instance, or a second appointment to supply a vacancy, and in either case the simple result would be that the mode of settlement provided had become ineffective. Such a result, must of course, have led to a new compromise and a new mode of settlement; and I have no doubt that such was the view taken at the time. It was intended that this mode of settlement should depend upon the subsisting consent of both Provinces; and the concurrence of the three Arbitrators was regarded as indispensable to the safe and just settlement of the business.

It could never, as a matter of public policy, have been contemplated by prudent men and statesmen, that two of the Arbitrators should have a power, under any circumstances, of banding together to the injury of either Province. Such a power would have been considered, and justly considered, dangerous to the interests of the whole Dominion, and perhaps to its integrity.

It was, above all things in this contest, important that each Province, while feeling the necessity of making sacrifices of extreme rights, should also feel satisfied that, upon the whole, the best possible result for all had eben attained. It was to prevent a decision, over which one Province should be jubilant, and the other irritated, and determined to resist, that the Statute, with the consent of the parties, required that the award should be the award of three.

The absence of any provision in the case of difference of opinion, the making the person to be chosen by the Dominion Government an Arbitrator and not an umpire, the singularity of these features in the Act when compared with other acts, and with treaties containing references to Commissioners and Arbitrators in matters of a national character, all shew that the Imperial Parliament intended by its language to express as an inflexible rule to be literally followed, the convention of the parties embodied in the law.

A few references may be made to shew with what care provisions are made, when it is intended that less than the whole number of persons appointed, may decide in national or quasi-national matters.

The Treaty of 1794 between Great Britain and the United States contains provisions for the appointment of five Commissioners to settle certain claims by the inhabitants of each of these countries upon the other, and fixes in precise and special terms the quorum and number who may decide, at three, of whom a Commissioner appointed by each Government must be one.

In the Treaty of Ghent, 1814, two Commissioners are to be named, and, in case of disagreement, reference is to be made to a friendly Sovereign or State.

And so in the Convention between Great Britain and the United States in 1863, referring to Commissioners the claims under the Oregon Boundary Treaty, a Commissioner is to be named by each Government, and they are to name an Umpire who, in case of difference of opinion, is to be the sole judge. Similar references might be multiplied almost without limit. I doubt much whether any instance can be found in Public Treaties and Conventions, in which the power is not specially given to the majority, when it is intended that it shall be so exercised.

But if we look into Acts of Parliament we shall find the same careful particularity when dealing with Arbitrators on questions of a national or quasi-national character.

Without extending our examples too far, we may refer to the Canada Trade Act, 3 Geo. IV., Cap. 119, in which provision is made for the division of duties of customs between U. & L. C. This division is committed to three Arbitrators, and the mode of appointment and the rules of proceeding are specifically laid down in the sections 17 and following to 21. The first of these (Sec. 17) fixes the mode of appointment. Sec. 20th makes provision for cases of the death of an Arbitrator or his removal or incapacity or refusal to act; and Sect. 21 enacts that a majority may decide, and gives them special power to do so, in the absence of the third, after due notice to him. Now, here is a series of particular provisions which are all utterly useless if the mere saying that three Arbitrators shall decide, means that two alone may decide in the absence of the third. If

all this special legislation is implied in the few direct and unambiguous words of the 142 Sec. of the B. N. A. Act why insert it in such minute detail in another Act of the same Legislative body, dealing with a cognate subject matter, between the same Provinces?

But there is another piece not of perfected but of intended legislation which may be consulted with profit upon this question. I allude to the Canada Bill, for effecting the Union of 1841, which, after several modifications, became law. In that Bill, as at first prepared by able hands in England and submitted, it was proposed (Sec. 58) to appoint five Arbitrators to establish electoral divisions, two of them to be appointed by each Government, and these to appoint an Umpire; and on their failure to do so within a certain time, the appointments were to be made by the Crown. By Section 60 of the Bill, each Arbitrator was liable to removal by the party appointing him; or (Sec. 61) if his place was vacated by death, resignation or refusal to act, provision was made for filling the vacancy. By Section 64 it was declared that all questions should be decided by a majority of votes. Here, also, is a special provision for compelling appointments—for filling vacancies, and for decision by a majority. But one of the most distinguished judges of Upper Canada, the late Ch. J. Robinson, in his remarks upon the Bill, contained in a pamphlet elaborately prepared and published at that time, objects to the 64th clause, that it is defective inasmuch as it does not fix the number of Arbitrators who must be present when a question was to be decided. "The absence," he says, "of one or two from illness or other cause, might cause the "Board to be unfitly constituted for the peculiar duties it has to perform." Thus, in his opinion, although special powers were given by the clause to a majority to decide, it would nevertheless be necessary that all should be present, unless a *quorum* were fixed by the law. This opinion is coincident with the view under which the special provision already mentioned is made in the Canada Trade Act, that two may proceed in the absence of the third, and is the undoubted rule of both the Civil and Common Law on the subject.

Canada and the Canada Bill, Ch. J. Robinson, pp., 169, 197, 220, 221.

I am convinced that a careful consideration, on the foregoing grounds, of this question of the right of two Arbitrators only under the authority given in the B. N. A. Act to proceed in the absence or even against the dissent of the third Arbitrator, will lead to the conclusion that it cannot be sustained; and, without carrying this investigation further, that no validity can attach to their proceedings and award.

I should be content to leave the whole case here; but it is easy to shew that these proceedings and the award are utterly without foundation of right even upon the narrow technical rules upon which they purport to be based.

If the words of the Statute are to be overridden by the rules of some municipal law, the first question which presents itself, is: in what system of municipal law are these rules to be looked for? The authorities cited have been chiefly those applied in the construction of powers in cases before the Courts in England upon instruments executed there; but no reason or precedent has been produced or can be found, to justify the position that upon a Statute of the Imperial Parliament which merely embodies a convention between two Provinces, to be executed within, and for the

sole benefit of those Provinces, and in which neither Great Britain, nor any body in it, has the slightest interest, is to be construed by the municipal law (not of Great Britain, for there is no such uniform municipal law) but of England; and I think it is pretty clear that it is not in the law of that country that we are to seek the rules of interpretation. Then, with respect to the law of the late Province of Canada, contained in the Interpretation Act, it is restricted in terms to the Statutes of the Parliament of that Province, and cannot be extended to control or interpret a Statute of the Imperial Parliament: and it may safely be affirmed, both of this law and of the law of England, that if either could apply, it would settle nothing essential to the result of this enquiry. Lastly, there are the two systems of municipal law, one for Ontario and the other for Quebec. They perhaps do not differ very much upon the subject under consideration, but still the question remains, which of them is to be considered authoritative and paramount to the others and therefore entitled to furnish the rule of construction? Now it seems to me that in the perplexity of this question, whether the Law of England, the Law of the Province of Canada, the Law of Quebec, or the Law of Ontario is to prevail, the only safe and indeed the necessary conclusion is that they are all inapplicable, and that the words of the Act must be accepted and followed in their obvious meaning. They should be so followed, with an absolute rejection of modification and forced construction by rules of municipal law which have grown out of and are intended for cases of an entirely different and inferior class. I can easily understand why the Courts should have said that when persons are appointed for the purpose of valuing leather under the Excise law, or of making local assessments for a common sewer, or of administering the affairs of a Water Works Company, or of executing the duties of Bailiffs, or of performing other public functions of a similar nature, that in order to secure promptness and efficiency in the discharge of such duties, the majority can act; but what possible analogy such cases and such powers have with the great public duty of settling conflicting rights between quasi-independent Proivnces, I am unable to understand. Yet, all the cases cited by the Counsel for Ontario and by Mr. Gray relate to the subjects indicated above, and they are really without any legal bearing upon the subject matter of this case, which might here be safely left.

King *vs.* Whitaker, 6 B and C, 648.
Carter *vs.* Kent W. Works, B & C., 332.
Grundey *vs.* Baker, 1 Bo and Pul, 229.
King *vs.* Benton 37. R. 592.
Coke upon Lit. 181 (b).
Roll. ab. 329.

It may be thought proper, however, although the task seems to me superfluous, to follow the question upon the narrower grounds on which the two Arbitrators have pretended to sustain it, and this I now proceed to do.

1st. The first of the specific questions is whether upon a hearing before the three Arbitrators two of them could legally render a decision in the absence of the third.

The formal opinion pronounced by the two Arbitrators on the twenty-first July, goes no further than to declare that a majority could decide upon a matter heard before the three. It does not touch the question of the absence of the third at all. It might therefore be passed over without particular examination or pronouncing upon its character.

As it was, however, the first of a series of grave mistakes, a few observations ought to be made upon it in connexion with the words of the B. N. A. Act. It may be safely affirmed that these words, as found in Section

142, if taken literally, are not in the least degree ambiguous or obscure; they plainly require that the division of the debts and assets of the Provinces of U. and L. C. shall be referred to the Arbitrament of three Arbitrators, of whom one shall be chosen by the Province of Quebec. And it is admitted that this clear requirement in any other instrument than a Statute, would undeniably receive from the Common Law Courts, as they do from common sense, the interpretation that it must be literally obeyed, and that the three must conjoin. It has been repeatedly said by Judges in England, that it is safer to follow what the Legislature has plainly said than to substitute for it something which it may be supposed to have meant. And Mr. Justice Story in dealing with the interpretation of a Statute says, "This "is a Legislative Act, and is to be interpreted, according to the intention of "the Legislature, upon its face. Every technical rule as to the construc- "tion or force of particular terms must yield to the clear expression of "the permanent will of the Legislature." These opinions are neither abstruse nor questionable. They are the obvious dictates of sound reason, and have a marked and forcible application in the present case. It is, then, for those who contest in the face of the precise language of the Statute, that the division under these words is to be made, not by the three Arbitrators, but by two, that is, by the Arbitrator of the Province of Ontario, and the Arbitrator appointed by the Dominion, to sustain that pretension; and such a discrepancy between the language in which the authority is conferred, and the mode of executing that authority, ought to be justified on grounds too clear to admit of controversy. But so far is this from having been done that no doubt can reasonably be entertained that the Authorities and arguments on which their decision purports to rest, have been misapplied, and the true distinction between references to Arbitration, and powers conferred for Public purposes, as understood by the Courts and applicable to the present case, has been misapprehended.

R. *vs.* Barham, 8 B. and C. 104
1 T. R. 512.
R. *vs.* Turvey, 2 B. & A. 523.
R. *vs.* Bray, 3 M. & S. 20.
Wilkinson *vs.* Lalond et al., 2 Peters Supt. Ct. U.S., page 662.

With respect to the argument, whether put originally or taken from the books, it must never be lost sight of, that it is at best secondary and *ab inconveniente;* the primary and obvious rule in the reading of powers in all instruments being, that the plain meaning of the words shall have its effect and be followed. This rule has been preserved in the Courts of England, when dealing with references to Arbitrators, and powers delegated by private parties; but in order to avoid mischievous obstructions and delay in matters of public authority, the language of some Statutes has been so construed, that when a specific number of persons have been authorized to discharge duties of a certain class, such duties may be performed by a majority of them. This relaxation from the primary rule for the construction of powers is reasonable in itself, but it must not be carried beyond the reason upon which it rests. Now, upon a careful examination of the English cases, it will be found in all of them, either that the public authority as in some way arrayed on the one side, and private rights and interests on the other, or that there was a question of the right of the majority of Directors or other Administrators in corporate bodies to govern the minority in the administration of the business of the Corporation. Such is the fact with respect to all those cases cited by the Counsel for Ontario and the two Arbitrators already adverted to. The question in them all was of the

enforcement of the higher and larger interest, against the lower and narrower one; but I deny that any well established case can be found in the English Books in which such a rule has been applied to the settlement of conflicting rights by Arbitration between litigant parties standing upon equal footing. The Arbitration in the present case may be said, in one sense, to be of a public nature because it is authorised by a Public Statute, and involves the rights of two great Provinces. That description of publicity attached also to the appointment and character of the Commissioners and Arbitrators under the authority of the Treaties and of the Canada Trade Act and Canada Bill mentioned on a former page, and their duties were eminently of a public nature; yet it has been seen that special provision was deemed necessary in all these instruments to legalize a decision by any number less than the whole. But wherein does this Arbitration differ in essential character and effects from an Arbitration between two individuals? If, a Legislature should by Statute make a similar provision for the division of property between individuals A and B, it would not be a public matter in the sense assumed by the decision of the two arbitrators. If instead of individuals it was between two Municipal Corporations, it would still be a mere Arbitration for the settlement of rights appurtenant to them as individual bodies. Its nature is not changed by the Corporation being two Provinces instead of two municipalities or two individuals; the simple object is to settle conflicting rights between equal parties. There is here no such *public nature* as justifies the departure from the primary rule concerning ordinary Arbitrations, in order to introduce the exceptional one, for the *public nature* contemplated in the cases in which the exceptional rule is applied, is that in which the public authority was to be enforced against the private interests, and not that kind of publicity which depends simply upon the importance and dignity of co-equal litigant parties.

To put the point in another form. If the submission to Arbitrators had been the mutual act of the two Governments, by a proper instrument, without the interposition of the Imperial Parliament, (for that interposition was not at all necessary to enable the Governments of Ontario and Quebec to settle their differences in that manner) in what respect would the Arbitration then have differed from an ordinary one between individuals? What principle of a public and higher interest paramount to a private and lower one could be found to justify a departure from the plain language of the submission. But in point of fact the interposition of the Imperial authority introduces no new principle. It was made at the instance of the two Provinces, and founded upon their mutual agreement, and is in effect simply a formal expression of that agreement as an instrument duly executed under seal would be. But I will pursue the topic of this particular decision of the two Arbitrators on the right of the majority to decide no further, for, as already stated, their opinion, although erroneous, is not of importance to the material question of the illegality of their final award.

The point raised by the first question, relating to the absence of the third Arbitrator when the decision was given, will, in order to prevent repetition, be treated under the second and third questions, to the former of which I now proceed.

The second question is stated in these terms:

2nd. Whether upon a hearing before two of the Arbitrators only, these two could legally give a decision in the absence of the third.

In the first question the case is put, of a decision by the two upon a hearing before all: in this, two only were present at the hearing, as well as at the decision. Whatever application the authorities cited may have been supposed to have to the former question, it is impossible to maintain that anything can be found in them to justify an affirmance of the present one. The reasons are substantial why the two cases should not be confounded.

When a case is heard before all, each has an opportunity of expressing his opinion, and of endeavoring to influence that of his co-Arbitrators. In that endeavour he may or may not succeed, but there is always safety in discussion, and from a conflict of opinion the truth is more likely to be struck out. But when the hearing as well as the judgment is by two only in the absence of the third, this advantage is lost, and whatever aid the suggestions and even the dissent of the third Arbitrator might afford in arriving at a just conclusion is wanting. Such is the obvious and weighty reasoning to be found in cases in which the fact of the absence of one of the Arbitrators from the hearing and deliberation, is dealt with in the English and American Courts, and its applicability and conclusiveness in the present case are too manifest to be denied.

It seems self-evident that if the Tribunal consists of three, each party has an interest and a right to be heard before the three, even if after the hearing and deliberation judgment can, in any case, be based upon the opinion of two of them against that of the third or in his absence. The three Arbitrators composed a Court; and it is to be observed that in all Statutes constituting Courts, the number is specially fixed, before whom proceedings can be had in the absence of the others. For example, by Statute, our Court of Appeals is made to consist of Five Judges of whom by special provision four may sit, in the absence of the fifth, and three may decide. Similar provisions are made in the Statutes constituting Courts in Upper Canada, and in the several United States; and if it were necessary to extend the examination, would be found, I have no doubt, in the Legislation of other countries. Now it will not, I apprehend, be pretended that if a Court be created to consist specifically of three judges, with no provision that a less number shall be a *quorum*, one or two of them alone can exercise the jurisdiction committed to the Court; the authorities of the Civil Law are conclusive upon this point. The rule is concisely and pointedly stated from the Roman Law, in a book of familiar reference, in these terms: "Dans les Arbitrages de même que dans les tribunaux, "les décisions passent à la pluralité des voix; ainsi, supposé qu'il y ait "trois Arbitres, ce sera l'avis uniforme de deux, en supposant que le troi- "sième soit d'un avis différent, qui formera la sentence. Mais il ne faut "pas conclure de là que quand il y a trois Arbitres, deux puissent pro- "céder seuls au jugement en l'absence du troisième. Il faut que tous "assistent au jugement." And this was conformable to the rule and prac- "tice of the French Courts. Tous les Arbitres," says Pigeau, "doivent "être assemblés pour juger. Un seul manquant, on ne le peut; et la "sentence serait nulle quand même tous ceux qui l'ont rendue auraient "été de même avis. Si un Arbitre refuse d'assister au jugement, on ne "peut y faire procéder par les autres."

Con: S, L. C. p 644.

Nouv. Den. V Arbitre §III. No. 2, p. 242 Dig. L. 17 §17 et 18 de receptis. Dom. Loix Civ. Li. 1 Tit: 14, Sec II c. 5, p. 151, fol Ed.

Pig: Proc; Civ. vol 1 pp, 24, 25

It would be easy to add to these references, but the law in France as stated in them admits of no doubt. Nor does, indeed, the law in England, for all the cases cited from the English books in support of the proceedings and award of Messrs. MacPherson and Gray establish simply two things.

1st. That a *majority* of Arbitrators may decide *when specially authorized by the reference*, against the opinion of the third, and sometimes, (but this is not so well settled) even in his absence after a hearing and deliberation by all.

2nd. That in matters of public authority committed to officers to be enforced against private interests, the majority may decide or act and so in public companies the majority of the Directors or other administrators bind the minority.

This is the utmost extent of the rules derivable from the cases referred to; and no case has been or can be produced in which it has been held that upon reference to a certain number of Arbitrators, whether such reference be by private instrument or public statute, an award can be given by less than the whole number when there is no provision to that effect; and of course, by stronger reason, in the absence of the third from the hearing and judgment. On the contrary, the whole of the authorities cited from the English law shew the illegality of the proceedings after the withdrawal of the Arbitrator appointed by Quebec. The same may be said of the cases cited from the American books. They conform in general principles with the English cases and give no support to these proceedings. The case of Croker *vs* Crowe (21 Wendell 211) was a matter of the distribution of Bank Stock by the Directors. Exparte Rogers (7 Cowen 526) was a case of assessment of damages by the Canal Commissioners of the State of New York. One of these commissioners, after hearing and deliberation with the other two, and the settlement of the judgment, dissented, and declared himself absent, although actually present at the decision. The Court said that the party could have suffered no injury from the declaration of absence, as the Commissioner was not appointed by the party, and had been present at the hearing and deliberation. There is no analogy between that case and the present one, and no rule can possibly be deduced from it to support the proceedings under consideration.

Before leaving this subject it may be incidentally observed that the passages referred to from Caldwell on Arbitrations (p. 202 to 210) want precision, and convey an erroneous impression. They are not borne out by the cases to which he refers, inasmuch as in all those cases the majority was specially authorized to decide.

Barnes p 57, Waller vs. King, 9 mod. 43.

The third question is—

3rd. Whether after one Arbitrator had resigned his office and his authority had been revoked, the remaining two could legally proceed to hear the case and make a final award.

This question differs radically from the two preceding ones. Those relate merely to the manner and conditions under which a duly constituted body, complete according to the authority by which it is created, may exercise its powers, while this raises an issue upon the authority of a portion of such a body after it has become incomplete by the loss of one of its members.

It is a question of jurisdiction and of illegal usurpation of powers. Let us compare the authority given, with the fact of its execution. The authority, by the precise terms of the Statute, is given to three Arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada. The fact is, that this authority has been executed while there were only two Arbitrators, the one chosen by the Government of Ontario, and the one chosen by the Government of Canada. It was to be a tribunal composed of *three*, not of *two* only; and the point now, is not as to the right of a majority in a complete tribunal to decide against a dissentient opinion, whether in the presence or absence of the dissentient; but it is, whether, when a tribunal has ceased to be legally constituted, any number of the individuals who composed it can proceed to exercise its powers.

It would seem to be enough to state this question without saying anything to negative the proposition contained in it. No reasonable course of argument can be made to sustain it, and certainly no authority can be produced in its justification. If two could proceed after the tribunal was rendered incomplete by the vacancy of one of its members, then, logically, one alone could have proceeded if there had been two vacancies; for if the expression of the law "Arbitrament of three" can be construed into the Arbitrament of two, when there is no third, then it may just as reasonably be construed into the Arbitrament of one, if one alone remained; for the two cannot adjudge as a majority, because after the occurrence of the vacancy they constitute the whole tribunal, and there can be no question of majority. So, also, after the occurrence of two vacancies there could be no question of majority, for the remaining Arbitrator would constitute the whole tribunal, and could therefore decide as sole judge. There is, in fact, no argument which can be urged in support of a judgment by the two, which would not, in the case put, equally support a judgment by one.

No man will have the hardihood to deny that if the vacancy were caused by death or inevitable accident, the two remaining Arbitrators would have been estopped from proceeding. But if it be objected that the vacancy in this case was caused by the voluntary act of one of the parties, (the Government of Quebec) the answer is, that this, if true, would be of no importance. The only essential fact was the vacancy;—of the causes of the vacancy, or the means by which it had occurred, the remaining two Arbitrators had no authority to enquire.

The tribunal of which they were members, had been reduced to a number less than that required by the law for its legal constitution; and they had nothing to do but to wait until the proper number should be supplied. That any mind trained to the investigation of legal questions can hesitate upon such a point is to me unintelligible. But it is noticeable that no express opinion is hazarded upon it. The two Arbitrators went on without adverting to this vital question, either overlooking its importance, or erroneously believing that it had been settled by their judgment on the right of a majority to decide.

I have said that if the vacancy were caused by the voluntary act of the Government of Quebec, it would make no difference; and, moreover, that the remaining two Arbitrators had no authority to decide upon this point. But if, as they seem to have supposed, they had a right to decide, and did decide it, then their decision was radically wrong upon the facts.

The Government of Quebec could not control the resignation of its Arbitrator. There was no coercive power which could be invoked to compel him to discharge the duty. A variety of personal motives may have made his resignation convenient or necessary to himself. If he would not act, the Government was powerless; and its acceptance of his resignation, and the *supersedeas* following it, were a necessary preparation for naming another Arbitrator. Or if the revocation of authority had come from the Government to its Arbitrator in the first instance, it would not change the legal aspect of the matter. The incapacity or ill-health of the Arbitrator, or his absence from the country, or a variety of other causes, might have rendered a revocation necessary. These questions the two Arbitrators had no right to investigate. A vacancy arose, and that alone dismembered the tribunal, and put an end to their authority to proceed. During the dismemberment and until a new appointment, the parties were clearly *coram non judice*.

As to the doctrine of the Courts in relation to this whole question, I am persuaded that no rule can be found under any system of law which reaches the point of countenancing the action of the two Arbitrators. No Court has ever said that where a power to judge is by precise terms vested in *three*, it is by construction so vested in *two*, that these alone might exercise it when there is no third; or in other words, that a jurisdiction might be exercised when in fact the body to which the law has entrusted it no longer exists. It is clear from the tenor of all the citations, whether from the Civil or the English Law, not only that the tribunal must be complete, but also that all the persons seized of the jurisdiction, must in the absence of special provision to the contrary, hear the case; and as an almost invariable rule be present at the judgment. As before stated, not a word is to be found in either of these systems of law, nor yet in the American books, (which introduce no new doctrine in this respect) to sanction the course of proceedings followed by the two Arbitrators after the other had ceased to hold office, and it appears to me that these proceedings and the rendering of the award were unwarranted and are beyond controversy void in law.

C. D. DAY.